IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35718

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 494**
	)	
Plaintiff-Respondent,	)	**Filed: June 9, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
RYAN JAMES FERGUSON,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Judgment of conviction for trafficking in marijuana, affirmed.

Douglas Nelson of The Roark Law Firm, Hailey, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Ryan James Ferguson appeals from his judgment of conviction for trafficking in marijuana. Specifically, Ferguson challenges the district court's order denying his motion to suppress. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Ferguson was driving his vehicle on a two-lane highway, with one lane for each direction of travel, when he approached two police vehicles engaged in a traffic stop on the side of the highway. One of the police vehicles was two or three inches over the white fog line and had activated its traffic stick--yellow warning lights on the top of the police vehicle which sequentially flash in the direction that cars should move around the stopped police vehicle. The posted speed limit on the highway was 65 mph. Ferguson slowed his vehicle to approximately 60 mph and maintained his vehicle in his lane of travel as he passed the two stopped police vehicles. One of the officers later testified that Ferguson's vehicle narrowly missed striking her

police vehicle by approximately six inches. Based on his failure to move over and yield to emergency vehicles with flashing lights activated, the officer effectuated a traffic stop of Ferguson's vehicle. During Ferguson's traffic stop, officers discovered approximately a pound and a half of marijuana.

Ferguson was charged with trafficking in marijuana. I.C. § 37-2732B. Ferguson filed a motion to suppress the evidence, arguing that the officers lacked reasonable suspicion to effectuate a stop of his vehicle. Ferguson argued that I.C. § 49-624(2) only required him to slow his vehicle under the speed limit when passing stopped police vehicles, which he did. Ferguson contended that the officer held a mistaken belief that he was required to do more and that mistake did not amount to reasonable suspicion to stop him.

The district court denied Ferguson's motion to suppress finding that the officer had reasonable suspicion to stop Ferguson's vehicle because his vehicle narrowly missed the police vehicle by six inches at 60 mph when the police vehicle was two or three inches onto the roadway. The district court held that this constituted reasonable and articulable suspicion that Ferguson had failed to maintain a safe speed until he had completely passed the police vehicles. Additionally, the district court found that the officer had not made a mistake because the totality of the circumstances demonstrated more cause for stopping Ferguson's vehicle than his mere failure to move into the opposing lane of traffic. Furthermore, the district court held that, even if a mistake of law occurred, the officer held an objectively reasonable belief that Ferguson failed to slow down below the speed limit or otherwise failed to maintain a safe speed for the conditions of the road.

Ferguson entered a conditional guilty plea to trafficking in marijuana and reserved the right to appeal the district court's denial of his motion to suppress. The district court sentenced Ferguson to a unified term of ten years, with a minimum period of confinement of one year. Ferguson appeals.

II.
ANALYSIS

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a

suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Flowers*, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998). The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop. *State v. Ferreira*, 133 Idaho 474, 483, 988 P.2d 700, 709 (Ct. App. 1999). The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer. *Id*. An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training. *State v. Montague*, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988). Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior. *Atkinson*, 128 Idaho at 561, 916 P.2d at 1286.

In this case, the officer testified that Ferguson's vehicle did not appear to slow down or move over at all as it passed her stopped police cruiser that was partially into the lane of travel. Additionally, the police officer testified that Ferguson's vehicle passed within six inches of her stopped police vehicle, which had activated its traffic stick lights indicating that traffic should move to the left. The officer stopped Ferguson for failing to yield to emergency vehicles with flashing lights. Ferguson testified that he had slowed his vehicle to 62 mph and moved over slightly as he passed the stopped police vehicles. Therefore, the district court's findings that Ferguson was driving his vehicle at or near 60 mph when he passed within six inches of the officer's vehicle, contrary to the instructions of the illuminated lights, are supported by substantial evidence.

We next consider whether these facts created reasonable suspicion to effectuate a stop of Ferguson's vehicle. Idaho Code Section 49-624 provides:

> The driver of a motor vehicle, upon approaching a stationary police vehicle displaying flashing lights or an authorized emergency vehicle displaying flashing lights shall:
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> . . . .
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> (2) If the driver is traveling on a highway with one (1) lane for each direction of travel, immediately reduce the speed of his vehicle below the posted speed limit, and maintain a safe speed for the road, weather and traffic conditions until completely past the stationary police vehicle or authorized emergency vehicle.

Additionally, I.C. § 49-654(1) provides, that "no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Idaho Code Section 49-1401 provides, in pertinent part:

> (1) Any person who drives or is in actual physical control of any vehicle upon a highway, or upon public or private property open to public use, carelessly and heedlessly or without due caution and circumspection, and at a speed or in a manner as to endanger or be likely to endanger any person or property, . . . shall be guilty of reckless driving . . . .
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> . . . .
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> (3) Inattentive driving shall be considered a lesser offense than reckless driving and shall be applicable in those circumstances where the conduct of the operator has been inattentive, careless or imprudent, in light of the circumstances then existing, rather than heedless or wanton, or in those cases where the danger to persons or property by the motor vehicle operator's conduct is slight.

The three statutes quoted above provide that it is a violation of law to operate a vehicle at a speed that is unsafe for weather or traffic conditions, in a manner that is unreasonable or imprudent, without due caution or in a manner likely to endanger persons or property, or, otherwise in a careless or inattentive manner. Ferguson's vehicle narrowly missed striking a stopped police vehicle while travelling at approximately 60 mph. Under these facts, the officer could have cited Ferguson for failure to yield to a stationary police vehicle, speeding, reckless driving, or inattentive driving. At the very least, the officer was justified in conducting a brief stop of Ferguson's vehicle to investigate the cause of his imprudence. Therefore, the stop of Ferguson's vehicle was based on reasonable and articulable suspicion that a violation of I.C. §§

49-624, 49-654, or 49-1401 had occurred. Accordingly, the district court did not err by denying Ferguson's motion to suppress.

Much of Ferguson's argument centers on the officer's subjective belief at the time she stopped his vehicle. Ferguson contends that the officer testified that her only reason for stopping his vehicle was his failure to move over, which he was not required to do under I.C. § 49-624(2). Ferguson cites to several cases where traffic stops have been held to not be supported by reasonable and articulable suspicion because a police officer mistakenly believed that the defendant was in violation of a traffic law. *See State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct. App. 1999) (no reasonable suspicion based on officer's mistaken belief concerning a change in speed limit from 45 mph to 25 mph); *United States v. King*, 244 F.3d 736 (9th Cir. 2001) (no reasonable suspicion based on officer's mistaken belief that it was illegal to drive with a handicap placard hanging from rear view mirror); *United States v. Twilley*, 222 F.3d 1092 (9th Cir. 2000) (no reasonable suspicion based on police officer's mistaken belief that defendant's vehicle displaying only rear license plate was against the law in the state of vehicle's registration).

The Idaho Supreme Court has held that the test for reasonable and articulable suspicion is objective and does not depend on an officer's subjective thoughts. *Deen v. State*, 131 Idaho 435, 436, 958 P.2d 592, 593 (1998). The cases that Ferguson cites regarding an officer's mistake of law or fact in effectuating a traffic stop are inapplicable to the present case because, in each of the cited cases, there was no other objective justification to support a reasonable and articulable suspicion to stop the vehicle. In this case, the officer had reasonable and articulable suspicion to investigate a potential violation of any one of the statutes discussed above.

Ferguson contends that this Court should not scrutinize his driving under other statutes because, he alleges, the officer testified that Ferguson did not do anything wrong outside of his failure to yield. Additionally, Ferguson contends that there was never any allegation by the officer or the state that he committed any other traffic violation.[1] In *Deen*, the Idaho Supreme

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[1] Additionally, Ferguson contends that this Court should not "engage in *ex post facto* extrapolations of all crimes that might have been charged on a given set of facts at the moment of arrest to retroactively validate an otherwise unlawful arrest." *Hernandez v. State*, 132 Idaho 352, 357, 972 P.2d 730, 735 (Ct. App. 1999). This case concerns only reasonable and articulable suspicion to effectuate a traffic stop, not the justification necessary to arrest. Therefore, we do not further address this argument.

Court held that it was not constrained by the bases previously offered by an officer or the state justifying a traffic stop. *Id.* The Court held:

> The fact that the officer did not testify in the hearing before the magistrate judge that Deen violated I.C. § 49-1401(3) or that the State did not argue I.C. § 49-1401(3) as the basis of the stop until this appeal does not prevent our consideration of this statute as a basis for the officer's action.

Id. Accordingly, we are not precluded from considering the various statutes justifying the investigatory stop of Ferguson's vehicle under the reasonable and articulable suspicion that an offense had occurred.

III.
CONCLUSION

The officer had reasonable and articulable suspicion that Ferguson had operated his vehicle in a manner contrary to I.C. §§ 49-624, 49-654, or 49-1401 when he passed within six inches of a stopped police vehicle while travelling approximately 60 mph. Therefore, the district court did not err by denying Ferguson's motion to suppress. Accordingly, Ferguson's judgment of conviction for trafficking in marijuana is affirmed.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**